United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1414

To be argued by
ROBERT J. COSTELLO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1414

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN CALI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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AUDREY STRAUSS,
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Of Counsel.

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Preliminary Statement

John Cali appeals from an order entered on June 16, 1976 in the Southern District of New York by the Honorable Milton Pollack, United States District Judge, denying the defendant's motion for a reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

Indictment 75 Cr. 1037,* a four-count indictment filed October 30, 1975, charged John Cali, Vito Giordano, Kenneth Black and John Croce in Count One with conspiring to violate the federal narcotics laws, in violation of Title 21, United States Code, Section 846. Count Two charged all of the defendants with distributing approximately 22 grams of heroin, in violation of

* This Indictment superseded Indictment 75 Cr. 768.

Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A). Counts Three and Four charged Cali and Giordano only, with distributing approximately 3 grams of heroin and 25 grams of cocaine.

On December 12, 1975 defendant John Croce entered a plea of guilty to Count One of the Indictment. It was expected that he would testify at the trial of his co-defendants.

On March 19, 1976 as the trial date approached, all of the remaining defendants pled guilty. Cali entered a plea of guilty to Count Four of the Indictment which charged the distribution of 25 grams of cocaine. Giordano pled guilty to Counts Three and Four; Black pled guilty to Counts One and Two.

On April 14, 1976 Croce was sentenced to three years probation. On May 3, 1976 Cali, Giordano and Black were each sentenced to four years' imprisonment to be followed by three years' special parole.

By motion papers dated July 15, 1976, Cali moved, pursuant to the provisions of Rule 35, Fed. R. Crim. P., for a reduction of sentence. On August 23, 1976, Judge Pollack denied that motion. This appeal was taken from the denial of that motion.*

Cali is presently serving his sentence.

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* On June 2, 1976, Cali filed a Notice of Appeal from the judgment of conviction entered on May 3, 1976. However, on September 20, 1976, he filed an Amended Notice of Appeal seeking review of the denial of his motion for reduction of sentence.

Statement of Facts

Although Cali entered a plea of guilty on March 17, 1976 to a violation of the narcotics laws, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), punishable by fifteen years imprisonment, he was apparently surprised on May 3, 1976 when the District Court sentenced him to four years imprisonment, less than one-third of the statutory maximum. At the time of sentence, defense counsel spoke at length on his client's behalf. He called the court's attention to the defendant's family life and he attempted to minimize the defendant's culpability, while also arguing that his client was contrite. (App. 13a-21a).* As his last argument on Cali's behalf, defense counsel urged that since Cali's co-defendant John Croce had been sentenced to a period of probation, Cali should be afforded at least equal treatment. In support of this position, defense counsel claimed that Croce's willingness to testify against his co-defendants made him an "informant" and as such was "below contempt, the lowest member of society," and, under the precepts of Talmudic law, subject to being put to death without trial. (App. 21a-23a).

On his own behalf, Cali told the court that he realized his mistake, he was sorry, and it would not happen again. (App. 24a). Judge Pollack responded to that statement as follows:

> "Kind of a disastrous mistake for those who find themselves in the position of taking this nefarious drug. This is just not like driving through a red light. This is destroying human lives, and you did it willingly and knowingly and for money." (App. 24a).

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* "App." refers to Appellant's Appendix; "Br." refers to Appellant's Brief.

The Government, when asked by the court if it had anything to add, controverted defense counsel's minimization of Cali's culpability, noting that this defendant had been "behind the scenes, at least partially calling the shots." (App. 25a). Defense counsel responded to that statement by presenting his view of the evidence and again urging leniency. (App. 28a).

Judge Pollack thereafter imposed sentence stating as follows:

> "This defendant is before the Court having admitted his guilt dealing with narcotics and subject to a maximum imprisonment term of 15 years and or a $25,000 fine, together with a minimum 3-year special parole if imprisoned.
>
> "There is no question about the defendant's guilt. He has admitted it. The only thing that he says about it is that he is not a drug user, and he characterizes his actions as foolish and stupid.
>
> "Not being a drug user, there is no excuse whatever for having entered into this kind of activity for profit, to the destruction and disaster of the people who fall heir to these nefarious drugs that he was parceling out in combination with others." (App. 28a).

The District Court then imposed a four year term of imprisonment to be followed by three years special parole.

By motion papers dated July 15, 1976 Cali moved for reduction of sentence pursuant to Rule 35. The primary basis for the motion was defense counsel's contention that Cali's co-defendant Croce should not have been given an advantage in sentencing as a result of

his willingness to cooperate. In support of this proposition, defense counsel cited the teachings of his "kindergarten class . . . that nothing was more reprehensible than being a tale bearer," as well as the principles of Talmudic law which, according to defense counsel, permit the "killing of an informer without a trial. . . ." (App. 5a, 7a).

Judge Pollack denied the motion by an endorsement order. This appeal followed.

ARGUMENT

The District Court Properly Denied Cali's Rule 35 Motion.

Cali's claim upon this appeal is not that his sentencing was improper or illegal in any way. His only contention is that his sentence must be vacated because a co-defendant, who was willing to testify against him, received a more lenient sentence. He characterizes that co-defendant as an "informant" and argues that this Court should promote "moral enlightenment" by stemming the tendency "in this nation" to put the informant "on a pedestal for approbation." (Br. 3).

The entire thrust of the argument is that a cooperating defendant is far more reprehensible for his cooperation with the Government than are his co-defendants for their activities in the narcotics business. Although the contention barely merits response, we note that in a recent case vacating a ten year sentence of a cooperating defendant, Judge Lumbard stated that "to let such a sentence stand would seriously cripple the necessary efforts of the government to secure the cooperation of malefactors without whose assistance and testimony it

is often not possible to prosecute their many partners in crime." *United States* v. *Stein*, Dkt. No. 76-1299, slip op. 211, 228 (2d Cir., Oct. 22, 1976) (Lumbard, *J.* concurring).

Cali presents no legal authority for his claim that his sentence must be reduced merely because Croce received more lenient treatment. It is of course well-settled that District Judges are vested with wide discretion in sentencing. *Williams* v. *Illinois*, 399 U.S. 235, 243 (1970). When a sentence is imposed within the statutory guidelines an appellate court can only disturb it in extraordinary cases where there has been a clear abuse of discretion, *Dorszynski* v. *United States*, 418 U.S. 424, 440-41 (1974); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932); *United States* v. *Scijo*, 537 F.2d 694 (2d Cir. 1976); *United States* v. *Goldberg*, 527 F.2d 165 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *Counts* v. *United States*, 527 F.2d 542 (2d Cir. 1975), *cert. dened*, — U.S. — (1976); *United States* v. *Swcig* 454 F.2d 181, 183-94 (2d Cir. 1972). This Court has repeatedly held that absent the sentencing judge's reliance on impermissible factors or upon materially incorrect information a sentence falling within statutory limits is not reviewable. *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown*, 479 F.2d 1170 (2d Cir. 1973); *United States* v. *Mitchell*, 392 F.2d 214 (2d Cir. 1968); *United States* v. *Holder*, 412 F.2d 212 (2d Cir. 1969). With regard specifically to review of motions under Rule 35, this Court said in *United States* v. *Slotsky*, 514 F.2d 1222, 1226 (2d Cir. 1975) the disposition of such a "motion is within the sound discretion of the district judge and the scope of appellate review is quite narrow."

In addition to these general principles under which Judge Pollack's order should be affirmed, it has been specifically held that a defendant cannot have his sentence set aside merely because a co-defendant received a lighter sentence. *Green* v. *United States*, 334 F.2d 733 (1st Cir. 1964), *cert. denied*, 380 U.S. 980 (1965). The difference in Croce's and Cali's sentences might be attributable to any number of factors which a District Court may consider in sentencing. However, even if the differential were entirely due to Croce's cooperation, that would be a wholly proper basis for the court to impose a more lenient sentence upon him. As this Court noted in *United States* v. *Araujo*, Dkt. No. 76-1085, slip op. 5101, 5108 (2d Cir., July 26, 1976), a plea of guilty together with cooperation with the Government may indicate "the first step toward rehabilitation" justifying a lesser sentence.

Cali's sentence was entirely reasonable under the circumstances and, indisputably, Judge Pollack did not abuse his discretion in refusing to reduce that sentence.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Robert J.Costello being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29 day of November, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

NORMAN J. MORDKOFSKY
910 SHERIDAN AVENUE
BRONX, NEW YORK 10451

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Robert J. Costello

Sworn to before me this

29 day of November, 1976

LAWRENCE FARKASH
Notary Public, New York State
No. 24-4606580
Qualified in Kings County
Comm. Expires March 30, 1977